No. 89-1510

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CAROL ANNE KLEEMANN, *et al.*,
Petitioners,

v.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fourth Circuit properly follow *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), in deciding which of the many contract documents constituted the "reasonably precise specifications" for purposes of applying the government contractor defense?

STATEMENT REQUIRED BY RULE 29.1

Respondent McDonnell Douglas Corporation is a publicly held corporation which has no parent company and no subsidiaries except those which are wholly-owned.

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STATEMENT OF THE CASE

This case is ultimately predicated on the contention that the accident in which Captain Henry Kleemann was fatally injured was caused by an improperly designed landing gear component which allegedly failed to meet a procurement objective of a "fail safe" design. At no time have petitioners asserted that the landing gear was improperly manufactured or that it did not comply with the then-applicable design and engineering specifications or drawings that had been approved by the government. Rather, petitioners simply charged that the gear was negligently designed, notwithstanding governmental approval, and that the government contractor defense of *Boyle* was inapplicable because the aircraft did not conform to service life requirements and similar mission-defining goals and objectives.

The magistrate and the district judge both correctly perceived that petitioners' suggested version of the government contractor defense would effectively abrogate *Boyle,* and granted summary judgment. The Fourth Circuit, through Judge J. Harvie Wilkinson, III, affirmed. Petitioners' application to this Court is based on a severely distorted reading of *Boyle* and, in substance, is a plea for reconsideration of that two-year-old decision. The petition presents nothing worthy of this Court's consideration and should be denied.

Background

This wrongful death action arises from the crash of a U.S. Navy F/A-18 aircraft at Miramar Naval Air Station, California, on December 3, 1985. The F/A-18 fighter aircraft was developed in the 1970s, pursuant to a government contract awarded to Respondent McDonnell Douglas Corporation ("MDC").

Because of F/A-18 mission requirements, the Navy required the design of the main landing gear to incorporate a mechanism and geometry to ensure stability upon landing and to accommodate weapons location and storage space (Apdx. 221, 392-93).[1] This design required the wheel to "deplane" — to move out of line and fold up into the wheel well for storage purposes during flight. A "planing link assembly" was designed to assist in folding and unfolding the wheel assemblies into and from the wheel well to position and lock the wheels appropriately for takeoff and landings (Apdx. 221, 427, 489-93).

Under the supervision of the Navy, MDC developed and submitted to the Navy for approval or disapproval detailed design drawings and blueprints, specifications and engineering analysis

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[1] The designation "Apdx." refers to the Appendix filed in the Court of Appeals. The appendix to the Petition for Certiorari filed in this Court will be cited "Pet. App. ____."

for the F/A-18 baseline configuration (Apdx. 222-23, 533-35).[2] Navy engineers and other personnel were intimately involved in the development and design of the F/A-18 landing gear and participated in the design process through periodic design review meetings, including Detail Design Review meetings, Technical Coordination meetings, F/A-18 Specialty Design Reviews and Production Readiness Reviews (Apdx. 222-23, 241-47). The Navy maintained discretion over the design of the product throughout and in fact rejected certain proposals for landing gear design (Apdx. 534-35, 494-506, 241-47).

MDC and the Navy extensively flight-tested prototype F/A-18s, and, as part of the required process, MDC performed numerous tests of the landing gear under actual flight conditions and under the close supervision of Navy test pilots and engineers (Apdx. 223-24). Only after these extensive flight tests, as well as the Navy-conducted Preliminary Evaluation Board of Inspection Survey, and only with the approval of the Navy, did the F/A-18 aircraft enter full operational service.

After the F/A-18 became operational, the Navy required MDC to modify the landing gear design in response to occasional incidents of bent planing links, which contributed to control problems upon landing (Apdx. 224, 494-506). Beginning in 1982, the Navy and MDC undertook a joint investigation of the cause of the bent planing links, but could not determine the exact cause of the bending (Apdx. 225). In early 1983 MDC formally proposed a redesigned planing link to the Navy, which exercised its discretion to maintain the existing design of the planing link and rejected MDC's proposal (Apdx. 242).

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[2] MDC contracted with Cleveland Pneumatic Company ("CPC") to design and manufacture the Main Landing Gear for the F/A-18. CPC developed the initial designs for the landing gear and eventually submitted engineering drawings and information for its final design to MDC for review and modification. MDC submitted the final engineering drawings and analysis to the Navy for approval or rejection (Apdx. 419, 442-43).

In November 1983 the Navy issued a Notice of Defect ("NOD") in connection with the recurring problem of bent planing links (Apdx. 248). After joint investigation by the Navy and MDC, MDC designed a "hydraulic restrictor" to slow the rotation of the gear after takeoff (Apdx. 387-88). This design modification allowed the wheel sufficient time to stop spinning, thus permitting the gear to be folded into the wheel well without the extreme torque forces on the planing link which had been identified as the cause of the bending (Apdx. 249). The Navy approved the modification and required it to be retrofitted on all existing planes and incorporated into all future aircraft (Apdx. 250-57). As petitioners have admitted freely below, both the Navy and MDC believed that the hydraulic restrictors would solve the problems with the planing links (Apdx. 98).[3]

It is undisputed that the aircraft in which Captain Kleemann was later fatally injured was delivered to the Navy in early 1985 with the hydraulic restrictor as well as all other required landing gear design requirements in place (Apdx. 444-47). The Navy inspected the aircraft and accepted it as conforming to specifications.[4]

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[3] On May 24, 1985, the Navy advised MDC that the NOD formally was closed. Petitioners' inflammatory insinuations that MDC "negligently concealed" (Pet. 6) design characteristics or that the Navy was "apparently unaware" (Pet. 3) of MDC's findings are contrary to the record and to petitioners' previously stated positions.

[4] In December 1987, almost two years after the Kleemann accident, the Navy sent a Request for Corrective Action requesting MDC to submit an Engineering Change Proposal to correct continuing problems with the gear. MDC submitted a proposal incorporating a change similar to that suggested in 1983 but rejected by the Navy. This time the Navy approved the proposed change (Apdx. 227, 650-51).

Proceedings Below

Petitioners brought this diversity action contending that the landing gear on the F/A-18 was defectively designed. After discovery, MDC moved for summary judgment on the basis of the military contractor defense as articulated in *Boyle*. The motion was referred to a magistrate for recommendation. The magistrate noted that petitioners challenged "only the second element of the . . . defense, whether the product conformed to the specification requirements" (Pet. App. C-2). The magistrate agreed with MDC's contentions and recommended that the district court grant the motion (Pet. App. C-6-7).

On *de novo* review, the district court also observed that only the second element of the defense was in dispute and adopted in full the magistrate's recommendation (Pet. App. B-1).

On appeal, the Fourth Circuit affirmed and rejected petitioners' principal thesis, saying: "we cannot . . . equate as a matter of law a failure of performance with an absence of conformity" (Pet. App. A-3). With regard to the only issue properly presented — the meaning of the term "reasonably precise specifications" — the court ruled that the record established as a matter of law that MDC had supplied an aircraft to the Navy in conformity with the specific requirements of the Navy, as evidenced by the drawings, blueprints and mockups agreed upon by the Navy and MDC. In rejecting petitioners' assertion that the landing gear did not meet certain precatory, qualitative performance goals and objectives, the court stated as follows:

> "[g]eneral qualitative specifications must be distinguished from the 'detailed, precise and typically quantitative specifications for manufacture of a particular military product.' *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 745 (11th Cir. 1985). These two broad types of specifications often overlap and may even be at cross purposes — for example, design specifications for a complex back-up system may conflict with the qualitative requirements of ease of

maintenance, combat effectiveness or cost containment. Only the detailed, quantitative specifications — and not those calling for such vagaries as a fail-safe, simple or inexpensive product — are relevant to the government contractor defense." (Pet. App. A-9).[5]

Rehearing and rehearing en banc were denied, and petitioners have now sought certiorari from this Court.[6]

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[5] The court, though noting that petitioners had contested only the second *Boyle* element, also found that the evidence plainly demonstrated the requisite governmental approval of the specification (Pet. App. A-6, n.2).

[6] Petitioners again raise new arguments that were neither briefed nor argued below, including: (i) that the U.S. Government is not immune from suit (Pet. 12-14); (ii) that the grant of summary judgment impinges on petitioners' Seventh Amendment right to a jury trial (Pet. 7, 23); (iii) that the lower courts extended the defense "to a contractor for a design defect for which the government would be liable" if it had designed the product (Pet. 12); (iv) that the decision violates the Separation of Powers doctrine (Pet. 5); and (v) that the decision provides greater immunity to MDC than the government would be entitled to (Pet. 5, 12). Other than to note that these novel arguments are untimely, unclear and unmeritorious, we do not deem them worthy of specific responses.

REASONS FOR DENYING THE WRIT

This petition presents the third post-*Boyle* military contractor defense case in which certiorari has been sought. In the first two instances, this Court denied the petition. *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), *cert. denied,* 58 U.S.L.W. 3596 (1990); *Trevino v. General Dynamics,* 865 F.2d 1474, *reh'g denied,* 876 F.2d 1154 (5th Cir. 1989), *cert. denied,* 110 S. Ct. 327 (1989). The instant case presents nothing more than straightforward application of *Boyle* to a pardigmatic military procurement effort and provides no basis for the exercise of this Court's discretionary review function.

I. THERE ARE NO NOVEL LEGAL ISSUES MERITING A WRIT OF CERTIORARI.

There is no doubt that the issues raised here and in cases such as *Trevino* and *Harduvel* are important to the litigants. But the Court in *Boyle* addressed and resolved the global legal and policy issues concerning the appropriate apportionment of liability in government contract cases. *Boyle* held that:

> "Liability for design defects in military equipment cannot be imposed pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512.

It now falls to the lower courts to flesh out the *Boyle* doctrine in the myriad of factual scenarios which have arisen and will continue to arise. Petitioners' proclamation that this case presents issues of "extraordinary national importance" grossly exaggerates the situation and ignores the importance of *Boyle* as the guiding principle in these cases.

Three levels of the federal judiciary have already determined unanimously that *Boyle* shields MDC from liability under the

facts of this case. Petitioners have never disputed the existence of the facts on which these determinations were based. They simply don't like *Boyle* and are willing or unable to acknowledge its obvious implications as applied to those facts.

II. THE PANEL'S DECISION WAS CORRECT AND WAS IN ACCORD WITH *BOYLE* AND THE DECISIONS OF OTHER CIRCUITS.

A. The Underlying Conflict Between State and Federal Interests.

This Court in *Boyle* specifically identified the conflict that would give rise to the government contractor defense:

> "[T]he state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanisms shown by the specifications)." 487 U.S. at 509.

In the case at hand, the asserted basis of MDC's liability (specifically, the alleged state-imposed duty to equip F/A-18 aircraft with the sort of landing gear mechanisms petitioners claim were necessary) is precisely contrary to the duty imposed by the government contract (the duty to manufacture and deliver F/A-18 aircraft with the sort of landing gear mechanisms shown by the approved specifications). MDC was contractually bound to manufacture and deliver exactly what it did, and any state law requirement to deliver another design would conflict with MDC's duties under the contract. Thus, as the Fourth Circuit found, ". . . plaintiffs describe exactly the situation in which the government contractor defense *does* apply: when the required ultimate military design fails to produce a 'reasonably safe' product under state law" (Pet. App. A-9).

Though petitioners did not raise this "displacement" issue in the trial court, they now seek to bootstrap themselves into this Court by claiming that the Court of Appeals' analysis conflicts with *In re Joint Eastern and Southern District New York Asbestos Litigation (Grispo et al. v. Eagle-Picher Indus., Inc.)*, Dkt. Nos. 89-7667, -7669, -7677 and -7679 (Slip op.) (2d Cir. Feb. 20, 1990), and *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990). Yet they fail to explain the nature of the alleged conflict or to provide concrete examples demonstrating its existence (Pet. 11). In fact, these decisions are consistent with the Fourth Circuit's analysis in the instant case.[7]

In *Eagle-Picher* the Second Circuit analyzed *Boyle* in a failure-to-warn context arising from the defendant's labeling of asbestos products used in ships during World War II. The court held that *Boyle* could provide immunity against failure-to-warn claims if the contractor could establish that the contract included warning requirements or restrictions that significantly conflicted with those that might be imposed by state law. Under the facts of that case, however, nothing indicated that the "Government controlled or limited the ability of contractors like Eagle-Picher . . . to warn those who would come into contact with its product." Slip op. at 1882. Because the record before the Court of Appeals was inadequate to enable the court to determine whether state law had actually been displaced, the case was remanded for further evaluation. Slip op. at 1886.

Nielsen concerned a "civilian worker injured in the course of a civilian job involving a product designed to further civilian,

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[7] Petitioners also contend that the panel's finding of the requisite conflict is contrary to the Fifth Circuit's decisions in *Trevino*, 865 F.2d at 1481 and *Bynum v. F.M.C. Corp.*, 770 F.2d 556, 574 (5th Cir. 1985). The *Trevino* panel never discussed the requisite conflict, however, apparently because the parties assumed that the case fell within the scope of *Boyle*. *Bynum* was decided in 1985 and is irrelevant to the issue because it was based on the now-rejected *Feres-Stencel* analysis rather than the discretionary function approach of *Boyle*. 770 F.2d at 574.

rather than military, objectives." 892 F.2d at 1455. Under those circumstances, the Ninth Circuit found "no reason to hold that application of state law would create a 'significant conflict' with federal policy requiring a displacement of state law," and that application of "local law would not significantly interfere with any uniquely federal interest." 892 F.2d at 1455.

By contrast, the facts here demonstrated the precise type of conflict that existed in *Boyle,* where "the required ultimate military design failed to produce a 'reasonably safe' product under state law" (Pet. App. A-9). In such contexts, post-*Boyle* courts regularly have applied the defense. *E.g. Harduvel,* 878 F.2d 1321; *Ramey v. Martin-Baker Co.,* 874 F.2d 946 (4th Cir. 1989); *Smith v. Xerox Corp.,* 866 F.2d 135 (5th Cir. 1989). There is no conceivable conflict between this case and *Eagle-Picher* or *Nielsen.*

B. The Panel Properly Applied the Elements of *Boyle.*

1. Approval

In light of the consistent findings below that petitioners failed to preserve arguments regarding government approval, the issue is not properly presented in their Petition. Even if it had been raised in timely fashion, this issue lacks substance. The Fourth Circuit agreed with the district court that there was substantial unrebutted evidence of the kind of "continuous exchange" that always has established approval under the defense (Pet. App. A-4-6, 7). *Boyle,* 487 U.S. 512; *Harduvel,* 878 F.2d at 1320; *Ramey,* 874 F.2d at 950; *Smith,* 866 F.2d at 137; *Tozer v. LTV Corp.,* 792 F.2d 403, 407-08 (4th Cir. 1986), *cert. denied,* 108 S. Ct. 2897 (1988); *Dowd v. Textron, Inc.,* 792 F.2d 409, 412 (4th Cir. 1986); *Schoenborn v. Boeing Co.,* 769 F.2d 115, 122 (3d Cir. 1985), *cert. denied sub nom. Eschler v. Boeing Co.,* 474 U.S. 1002 (1986); *Maguire v. Hughes Aircraft Corp.,* 725 F. Supp. 821, 823-24 (D. N.J. 1989); *Niemann v. McDonnell Douglas Corp.,* 721 F. Supp. 1019, 1025-26 (S.D. Ill. 1989). The

court's finding thus was consistent with every other opinion that has considered the question.[8]

Petitioners' effort to fabricate a conflict between the panel's conclusion and the Fifth Circuit's analysis in *Trevino* is wide of the mark. In *Trevino* the Fifth Circuit determined that there had been no approval for purposes of *Boyle* because the Navy never participated in the design of the product and never conducted a formal design review. 865 F.2d at 1487, n. 13. Thus, Navy participation in the design in *Trevino* amounted to little more than the "rubber stamp" that has always been deemed insufficient to establish approval. *Boyle,* 487 U.S. at 512; *Tozer,* 492 F.2d at 407-08; *Schoenborn,* 769 F.2d at 122. The Fourth Circuit properly distinguished this case from *Trevino,* because the Navy here "performed extensive review of detailed design drawings submitted by MDC" (Pet. App. A-8). There is no conflict among the circuits on this issue.

2. Reasonably Precise Specifications

As noted above, the Fourth Circuit rejected petitioners' interpretation of the term "reasonably precise specifications." Its analysis was moored intellectually to the distinction between "qualitative" and "quantitative" specifications developed by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 745 (11th Cir. 1985), *cert. denied,* 108 S. Ct. 2896 (1988) (Pet. App. A-8-9). In *Harduvel* the Eleventh Circuit again rejected the suggestion that generic performance goals or mission-defining objectives constituted the relevant reasonably

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[8] Petitioners admit that the Navy was involved in continuous exchanges with MDC over the design of the F/A-18. Nonetheless they now contend that there was no *Boyle*-type approval "notwithstanding" the "Navy participation in design, continuous exchanges of information or extensive drawing review" (Pet. 15). Petitioners thus do not challenge the undisputed fact that there was such Navy participation, but merely attack the long-standing rule that such exchanges demonstrate approval as a matter of law. The law on that question is well settled and in need of no further articulation by this Court.

precise specifications under *Boyle*. 878 F.2d at 1319, n. 3. Judge Wilkinson correctly recognized that petitioners' interpretation, which included "such vagaries as fail-safe, simple or inexpensive product" would "render the government contractor defense illusory" (Pet. App. A-9).

The Fourth Circuit's reasoning is in the mainstream with that of all other circuits that have addressed this element of *Boyle*. In *Trevino* the Fifth Circuit held that the working drawings for the subject product, not a 339-page "circular of requirements" that described "design concepts," constituted the reasonably precise specifications. 865 F.2d 1476.[9] That conclusion was consistent with its analysis in *Smith*, 866 F.2d at 138 ("government reviewed and approved Xerox's final drawings and specifications...."). *See also, e.g., Schoenborn*, 769 F.2d at 123 ("[d]etail drawings also mandated the amount of sync shaft clearance...."); *Galik v. Lockheed Shipbuilding Co.*, 727 F. Supp. 1433, 1436 (S.D. Ala. 1989) ("The contract drawings are clear."); *Niemann*, 721 F. Supp. at 1026 ("the use of specific components of the aircraft ... is called for on drawings for the aircraft. Government review and approval of all the design drawings was required before ... production of military aircraft."); *In re Agent Orange Product Liability Litigation*, 534 F. Supp. 1046, 1056 (E.D.N.Y. 1982) (subsequent history omitted) (if government approved only a " 'performance specification,' as opposed to a specified product then the defense would be far more restricted...").

The Fourth Circuit panel properly held, in accordance with established case law, that the final detailed drawings and engineering analysis, rather than general qualitative performance objectives established during the "initial, theoretical phase of the development of the F/A-18 landing gear," controlled the analysis (Pet. App. A-7).

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[9] Thus, petitioners' representation that *Trevino* held that the drawings were the reasonably precise specifications "in the absence of anything else that could possibly qualify" is untrue (Pet. 17, n. 16).

3. Conformity

The concept of conformity is inextricably linked to the specifications identified as controlling the analysis. *Boyle,* 487 U.S. at 512. Once the relevant specifications are identified, conformity occurs when "those specifications" have been complied with. *Id.* The Court of Appeals, citing Justice Powell's opinion for the Eleventh Circuit in *Harduvel,* held that a product conformed to the reasonably precise specifications when it satisfies ' "an intended configuration,' even if it 'may produce unintended and unwanted results' " (Pet. App. A-9). Since it is undisputed that the landing gear conformed to the quantitative specifications, the panel quite logically determined that the landing gear met the *Boyle* test for conformity (Pet. App. A-6).

Petitioners acknowledge that the Fourth Circuit's analysis is consistent with the Eleventh Circuit's in *Harduvel* (Pet. 18). Rather than even attempting to concoct a conflict between the panel's decision and other cases, petitioners simply complain that the *Harduvel* analysis was wrong and that its use here will "abolish military contractor design liability" (Pet. 17). Petitioners' refusal to accept the consequences of *Boyle* is nowhere better illustrated than in that statement; *Boyle* provides exactly such immunity for military contractors when they otherwise meet the requirements of the defense.

Likewise, petitioners' recurring refrain that the alleged defect in the landing gear resulted "solely from contractor negligence" misses the point. Government participation, as here, means by definition that the design is not "solely" the contractor's. If contractors cannot show such government participation and cannot establish that they delivered a product conforming to approved designs, they are not entitled to the immunity. Since MDC established the requisite elements here, summary judgment was appropriate, and the Fourth Circuit's affirmance was nothing more than a routine application of established precedent.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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